LABOR AND EMPLOYMENT LAW

CALIFORNIA LAWYERS ASSOCIATION

presents

Employment Law 101 – Fundamentals for the New Employment Practitioner

Complying with the National Labor Relations Act (NLRA)

Thursday, February 13, 2020
12:30 p.m. – 1:45 p.m.

Speakers:

Kwan Park

Christy J. Kwon

Conference Reference Materials

CALIFORNIA LAWYERS ASSOCIATION

Employment Law 101 – Fundamentals for the New Employment Practitioner

February 6, 2020, Los Angeles
February 13, 2020, San Francisco

OVERVIEW OF THE NATIONAL LABOR RELATIONS ACT AND INTRODUCTION TO NLRB PRACTICE

Christy J. Kwon, Regional Attorney, NLRB
Kwan Park, Associate, Morrison & Foerster

National Labor Relations Act

- Congress enacted the National Labor Relations Act ("NLRA" or the "Act") in 1930s.
- The NLRA covers nearly all private sector employees, with a handful of exceptions:
  - employees covered by the Railway Labor Act, *i.e.*, most railroad and airline employees;
  - agricultural employees;
  - managerial employees;
  - supervisors; and
  - independent contractors.
- Most public sector employers, except the U.S. Postal Service, are not covered by it.

National Labor Relations Board

- The National Labor Relations Board ("NLRB" or the "Board") plays 2 very different, but interrelated, roles that tracks the bifurcation of the Agency between the authority of the General Counsel and the Board, and each side delegates certain authority to the Regional Director.
- R-Cases: One role is to conduct representation elections. These elections allow employees to vote in or to vote out unions as their representatives.
- C-Cases: The other role is to investigate and prosecute allegations that an employer or union engaged in an unfair labor practice. The NLRB investigates as a "neutral" party. However, if the investigation reveals evidence that the NLRB views to involve wrongdoing, the NLRB will assume a role as the prosecutor who takes cases to a trial absent settlement.

NLRB in California

- California has four Regions and five offices:
  - Region 20 is based in San Francisco and covers much of Northern California with one Resident Officer in Sacramento.
  - Region 32 is based in Oakland and covers areas of Northern and Central California as well as Northern Nevada.
  - Region 31 is based in West Los Angeles and covers an area from Los Angeles and north and San Bernardino counties.
  - Region 21 is based in Downtown Los Angeles and covers an area from Los Angeles, Orange, and Riverside Counties and south.
  - San Diego has its own sub-regional office for San Diego and Imperial Counties, which is part of Region 21.

What Does the NLRB Protect?

- Unfair labor practices by employer
  - Section 8: It shall be an unfair labor practice for an employer –
    1. to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

       * * *

    3. by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .
    4. to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter. . . .
    5. to refuse to bargain collectively with [the employees' union]

- **Section 7** of the NLRA protects employees' rights to self-organization, to **form join, or assist labor organizations**; to **bargain collectively** through representatives of their own choosing, and to **engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection**, and shall also have the right to refrain from any or all such activities . . .

Common Violations of Section 7 Rights

- Common Section 7 violations include:
  - Restricting access to employee and work site;
  - Employer policies, handbook provisions, and informal rules limiting employees' right to engage in Section 7 activities ;
  - Threats to discipline employees or withdraw benefits in response to their protected activities Section 7 activities;
  - Discrimination because employees have exercised their Section 7 rights under the Act; and
  - Duty to bargain and provide information once Union represents employees.

Changes in Board Law

- The 5-member Board is appointed for a specific term by the President and therefore Board law changes based upon the Administration.
- Currently, the Trump Board has reversed many of the laws in effect during the Obama Board and has engaged in rule-making, which has been rarely exercised.
- You can keep abreast by subscribing to receive NLRB updates by email at www.nlrb.gov.

Overview of Basic C-Case Law

- Access to property, employees, e-mail
- Protected concerted activities and rights of non-union employees
- Discrimination for union conduct
- Workplace rules
- Independent contractor test
- Joint employment
- Duty to bargain

Workplace Access by Employees

- The NLRB has indicated that it will invoke its rulemaking authority to issue rules regarding employee access to employer property. For now, rules regarding access to the workplace to engage in Section 7 activity are based on NLRB and court decisions.
- Employees have a presumptive Section 7 right to engage in solicitation in the workplace during nonworking time in working areas, and to distribute materials during nonworking time in nonworking areas. See Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). The right to solicit includes the right to wear union buttons or stickers at work.

Workplace Access by Employees

- Employers may restrict employee solicitation and distribution if they can show "special circumstances" related to maintaining production or discipline.
  - For example, hospitals may prohibit solicitation in immediate patient care areas, *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979), and in some circumstances retail employers may prohibit solicitation in the selling areas of a store, *J.C. Penny Co., Inc.*, 266 NLRB 1223 (1983).
- Similarly, an employer may prohibit employees from wearing union insignia such as buttons or stickers where it can demonstrate "special circumstances." *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (Dec. 16, 2019).
  - Such circumstances might exist where permitting employees to display buttons would jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for employees. *In-N-Out Burger v. NLRB*, 894 F.3d 707 (5th Cir. 2018). However, the NLRB and courts have construed this exception narrowly.

Workplace Access by Employees

- An employer may also have a facially neutral policy limiting the size and/or appearance of union buttons and insignia depending on the nature and extent of the potential impact on NLRA rights and the legitimate justifications associated with the policy. *Wal-Mart Stores, Inc.*, 368 NLRB No. 146, at *2.

Workplace Access by Employees

- Off-duty employees have a presumptive Section 7 right to access the parking lots, gates, and other outside nonworking areas of their employer's property to engage in union activity. *Tri-County Medical Center*, 222 NLRB 1089 (1976).
- However, a property owner may exclude from its property off-duty contractor employees seeking access to the property to engage in Section 7 activity unless those employees work regularly and exclusively on the property and the property owner cannot show that employees have other reasonable "nontrespassory" alternative means of communication. *Tobin Center for the Performing Arts*, 368 NLRB 46 (Aug. 23, 2019).

Workplace Access by Employees

- Employees do not have a right to use their employer's e-mail system to engage in Section 7 activity, unless it is the only reasonable means for employees to communicate with one another. *Rio All-Suites Hotel*, 368 NLRB No. 143 (Dec. 16, 2019).
- Employees have a right to engage in an on-the-job work stoppage on the employer's property, depending on a number of factors, including the reason for the stoppage, the impact of the stoppage of production and/or access to the employer's property, the duration of the stoppage, and whether employees remained on the premises beyond their shift. *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005).

Workplace Access by Non-Employees

- An employer may ban nonemployee union representatives from its property so long as the union can reach employees through other available channels of communication and the employer does not discriminate against the union by permitting other solicitation or distribution. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).
  - The circumstances in which a union lacks other available channels of communication to reach employees are rare. In *Lechmere*, the Court cited logging camps, mining camps, and mountain resort hotels as examples.
  - Similarly, the discrimination exception is narrow. Thus, an employer may lawfully deny nonemployee union organizers access to its property so long as it also bans comparable organizational activities, even if its permits access by nonemployees to engage in civic, charitable, or commercial solicitations. *Kroger Ltd. Partnership*, 368 NLRB No. 64 (Sept. 6, 2019).
  - Moreover, an employer may bar nonemployee union representatives from areas of its private property that are otherwise open to the public, such as a hospital cafeteria. *UPMC*, 368 NLRB No. 2 (June 14, 2019).

The Rights of Non-Union Workers

- Non-union workers have the same basic rights under the NLRA, with a few exceptions, as unionized employees. First and foremost, they are covered by Section 7 of the NLRA, which provides:
  - **Employees shall have the right to self-organization**, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, **and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection**.
- The NLRB has been devoting even more attention over the last decade to these Section 7 rights, particularly the highlighted ones but current Board has been heightening the burden to prove a violation. *See Alstate Maintenance Inc.*, 367 NLRB No. 68 (2019) (overturning 2011 precedent that held that an employee's complaint in a group setting was *per se* concerted activity).

Protected Concerted Activities

- What does it take to qualify as "concerted activity"?
  - The obvious case is when two or more workers join forces to demand improvements in their wages or hours or working conditions or anything else that qualifies as a "term and condition of employment." To list a few examples:
    - group actions, such as delegations to management;
    - talking about improving workplace conditions and helping co-workers;
    - giving out flyers in non-work areas;
    - signing up co-workers to support a campaign;
    - wearing buttons, stickers or t-shirts that publicize workers' demands;
    - internal complaints to management on issues of more than individual concern; and
    - publicizing worker complaints on issues of more than individual concern.

Protected Concerted Activities

- As set forth in the NLRA, it is illegal to fire a worker who complains to a state agency about matters relating to employees' wages, hours, working conditions and the like, unless that employee is acting entirely alone, without making any effort to inform or involve other workers, or is complaining only about purely individual matters.
  - Note that an employee who might not be engaged in concerted activities is almost certainly covered by one of the dozens of federal and state whistleblower statutes.
- Individual workers can engage in concerted activity, even when acting alone.
  - Speaking to another worker about an issue of more than purely individual concern is concerted activity.

Discrimination in Employment For Union Activities

- Section 8(a)(3) of the NLRA prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."
- Under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transp. Mgt. Corp.*, 462 U.S. 393 (1983), the General Counsel bears an initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the employer's adverse employment action. Current Board will require strong animus evidence to meet this burden. *See, Electrolux Home Products*, 368 NLRB No. 34 (2019).
- The burden then shifts to the employer to establish by a preponderance of the evidence that it would have taken the same action even in the absence of the employee's union or other protected concerted activity.

Discrimination in Employment

- Proof of discriminatory motivation can be based on direct evidence or circumstantial evidence based on the record as a whole. The ultimate burden of persuasion rests with the General Counsel.
- Circumstantial evidence can include employer animus against the union or protected, concerted activity; timing of the adverse employment action; disparate treatment; pretextual reason for the adverse employment action; or shifting rationale for the adverse employment action.

Employee Handbooks and Workplace Rules

- Changes in legal standard since the decision in *Boeing Co.*, 365 NLRB No. 154 (2017).
- More workplace and handbook rules are now lawful.

The *Boeing* Company Decision

- Before the Board's *Boeing* decision in 2017, facially neutral employer policies could be found to be unlawful under the NLRA if workers could "reasonably construe" them to prohibit Section 7 activity.
- *GC Memorandum 15-04*, a 2015 memorandum by the then-General Counsel Richard Griffin, Jr., discussed how civility rules directing employees to "avoid the use of offensive, derogatory, or prejudicial comments" and not to make "insulting, embarrassing, hurtful or abusive comments about other company employees online" were unlawful.

The *Boeing* Test

- In *Boeing*, the Board reversed the administrative law judge's ruling that the company's no-camera rule violated the NLRA under the prior "reasonably construe" standard and found that the company maintained a lawful rule because the potential impact on employee rights was comparatively slight and outweighed by the justifications, including national security concerns.
- The *Boeing* decision replaces the "reasonably construe" standard with a balancing test that weighs:
  - The nature and the extent of the potential impact on rights protected by the NLRA; and
  - An employer's legitimate justifications for the rule.

The *Boeing* Test: Category 1 Rules

- The *Boeing* decision further established three categories of rules under this balancing test:
  - (1) Rules that are lawful to maintain either because (1) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights or (2) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.
    - *GC Memorandum 18-04*, a 2018 memorandum by the current General Counsel Peter Robb, discusses how civility rules, no photography/recording rules, and defamation or misrepresentation rules, among others, fall under the first category.
    - In contrast to the 2015 memorandum, the 2018 memorandum discusses how rules that prohibit employees from engaging in "[r]ude, discourteous or unbusinesslike behavior," using "[d]isparaging, or offensive language," or posting "any statements, photographs, video or audio that reasonably could be viewed as disparaging to employees" should be considered lawful.

The *Boeing* Test: Category 2 Rules

- (2) Rules that warrant individualized scrutiny as to whether the rule prohibits or interferes with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate employer justifications for the rule.
  - Examples of the second category rules provided by Memorandum GC 18-04 include but are not limited to:
    - Rules regarding disparagement or criticism of the employer (as opposed to civil rules regarding disparagement of employees);
    - Rules regulating use of the employer's name; and
    - Rules against making false or inaccurate statements (as opposed to rules against making defamatory statements).

The *Boeing* Test: Category 3 Rules

- (3) Rules that are unlawful to maintain because they prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.
  - Examples of the third category rules provided by Memorandum GC 18-04 include:
    - Confidentiality rules specifically regarding wages, benefits, or working conditions; and
    - Rules against joining outside organizations or voting on matters concerning employer.

Recent Applications of *Boeing*

- *LA Specialty Produce Company*, 368 NLRB No. 93 (2019) (finding lawful employer confidentiality rule that obliged employees to protect confidential information, such as the employer's client/vendor lists and media contact rule limiting what workers could say to reporters).
- *Apogee Retail LLC*, 368 NLRB No. 144 (2019) (finding lawful employer rule requiring employees to "maintain confidentiality" regarding workplace investigations into "illegal or unethical behavior" and other rule prohibiting "unauthorized discussion" of investigations or interviews "with other team members").

Independent Contractors and Misclassification

- Comes up regularly as an NLRB issue.
- NLRA Section 7 rights regarding union and concerted activity extend only to "employees".
- Section 2(5) of NLRA defines "employee" and excludes "any individual having the status of an independent contractor".
- As with "wage theft" claims brought under California law, employee and union advocates have argued that independent contractor misclassification strips employees of Section 7 rights and doing so violates Section 8(a)(1).
- NLRB chose to pursue the direction that misclassification itself is unlawful, for example *Pacific 9 Transportation*, Case 21-CA-150875 (Advice Memorandum of 12/18/15).
- An Administrative Law Judge found a misclassification violation in *Intermodal Bridge Transportation*, Case 21-CA-157647 (ALJD 11/28/17).
- *Velox Express, Inc.*, 386 NLRB No. 61 (2019)(misclassifying employee as independent contractor not a separate violation).

Independent Contractors and Misclassification

- New NLRB General Counsel announced a change in policy in GC Memorandum 18-02 (2017) entitled "Mandatory Submissions to Advice," which rescinds prior guidance and the suggestion that misclassification alone would violate NLRA, however, leaves open the possibility that if there is evidence an employer used misclassification to interfere with Section 7 activities it might be viewed as unlawful.
- California State law is irrelevant to the standards NLRB uses to determine independent contractor status, therefore AB 5 and the ABC test may not matter, leading to potentially inconsistent outcomes depending on whether state or federal law applies.
- Federal law standards apply to NLRB, as confirmed by federal courts including the US Supreme Court.

Independent Contractors and Misclassification

- NLRB follows common law agency principles to determine whether a worker is an employee or independent contractor – *NLRB v. United Insurance*, 390 US 254 (1968).
- Under *NLRB v. United Insurance*, "there is no shorthand formula or magic phrase that can be applied to find the answer" on employee versus independent contractor status." Rather, "all the incidents of the relationship must be assessed and weighed with no one factor being decisive." And, "what is important is that the total factual context is assessed in light of the pertinent common-law agency principles." Cited in *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017), which overturned an NLRB finding of employee status, holding instead that drivers at issue were independent contractors not protected by NLRA.

Independent Contractors and Misclassification

- The current NLRB standard for independent contractors cited in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019).
- In *SuperShuttle DFW*, the NLRB panel overruled prior precedent in *FedEx Home Delivery*, 361 NLRB 610 (2014), which the DC Circuit's *FedEx* ruling had already rejected.
- The *SuperShuttle DFW* ruling confirms independent contractor issues are governed by the traditional common-law test.
- In *SuperShuttle DFW* the Board panel relied heavily on entrepreneurial opportunity in finding workers at issue were independent contractors.

Independent Contractors and Misclassification

- The issue is controversial and could very well change depending on who is President and appointing NLRB officials.
- Pending legislation in the Protecting the Right to Organize (PRO) Act would establish the ABC test to determine independent contractor status at NLRB.
- Governor Newsom's signing message on AB 5 speaks of situations where workers lack protection of the law — this signals a possibility State law might try to change this chemistry and a likely question of whether Federal law might preempt such efforts.

Joint Employment Under the NLRA

- Determination that two separate businesses constitute a "joint employer" can have important consequences for the businesses, unions, and employees alike, for example:
  - Joint employer may be compelled to bargain in good faith with a union;
  - Joint employer may be found to be jointly and severally liable for unfair labor practices committed by the other joint employer; and
  - Finding of joint-employer status may determine whether picketing directed at a particular business is primary and lawful, or secondary and unlawful.

Joint Employment: Pre-2015 Test

- The starting point for any finding of a joint-employer relationship was that the two employers must "share or codetermine those matters governing the employees' essential terms and conditions of employment."
- Under pre-2015 Board precedent, the "essential element" of the joint employer test was whether the putative joint employer's control over the employees' terms and conditions of employment was "direct and immediate."

The *Browning-Ferris Industries* Test

- The joint employer test changed in mid-2015 when the Board explained in *Browning-Ferris Industries* that it would no longer require proof that a putative joint employer has exercised any "direct and immediate" control over the essential working conditions of another company's workers.
- Under the new *Browning-Ferris* standard, the Board would evaluate:
  - Whether a common-law employment relationship exists; and
  - Whether the putative joint employer "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful bargaining."

Joint Employment: Proposed Rule

- In September 2018, the Board proposed a rule that would undo the *Browning-Ferris* standard.
- Under the proposed rule, an employer may be considered a joint employer only if it shares or codetermines the workers' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction.
- Joint employer must possess and actually exercise "substantial direct and immediate control" over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

Mandatory Arbitration Agreements

- In the 2012 decision *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), the Board held that mandatory arbitration agreements that contain class and collective action waivers violate Section 7 of the NLRA.
- But the U.S. Supreme Court in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), held that such agreements do not violate the NLRA.

Mandatory Arbitration Agreements

- Most recently, in *Cordúa Restaurants, Inc.*, 368 NLRB No. 43 (2019), the Board held:
  - Employers are not prohibited under the NLRA from informing employees that failing or refusing to sign a mandatory arbitration agreement will result in their discharge.
  - Employers are not prohibited under the NLRA from promulgating mandatory arbitration agreements in response to employees opting in to a collective action under the Fair Labor Standards Act or state wage-and-hour laws.
  - Employers are prohibited from taking adverse action against employees for engaging in concerted activity by filing a class or collective action, consistent with the Board's long-standing precedent.
- But see, *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (2019)(provisions that make arbitration the exclusive forum for resolution of all claims unlawful because it restricts access to the NLRB.)

The Duty to Bargain – Section 8(a)(5) of the Act

- While the parties must bargain over "mandatory" subjects – like wages, hours, and other conditions of employment – they are not required to, but may, bargain over "permissive" subjects – those that are not directly related to the employment relationship. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958).
- Neither party can dictate the other's choice of bargaining representative. *General Electric Co. v. NLRB*, 412 F.2d 512 (2d Cir. 1969).
- The employer cannot make changes to mandatory subjects of bargaining without first providing the union with notice and reasonable opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962).

The Duty to Bargain

- Section 8(a)(5) of the NLRA makes it unlawful for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(b)(3) makes it unlawful for a union "to refuse to bargain collectively with an employer."
- Section 8(d) of the NLRA defines "bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession."
- Section 8(d) requires the parties to negotiate with a sincere purpose to reach an agreement, but does not require either party to make a concession on any specific issue or adopt any particular position. It further requires the parties to meet at reasonable times, which means bargaining at reasonable intervals and without unreasonable delays.

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The Duty to Bargain

- The employer cannot deal directly with employees regarding mandatory subjects of bargaining. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944).
- The employer must provide the union with information necessary and relevant for the performance of its duties, including collective bargaining, grievance handling, and contract enforcement. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967). The union has a similar duty to provide information to an employer under certain circumstances. *California Nurses Ass'n*, 326 NLRB 1362 (1998).

Representation Cases (R-Cases)

- New R-Case Rules are set to change 120 days from Publication which occurred sometime in December 2019.
- Nationally approximately 6.4% of private sector employees are in unions.*
- Nationally approximately 33.9% of public sector employees are in unions.*
- In California, the percentage of employees who are in unions is higher
  - In 2018, the percentage of union members in California was 14.7% and while it was 10.5% in the United States.*

    (*data from https://www.bls.gov)

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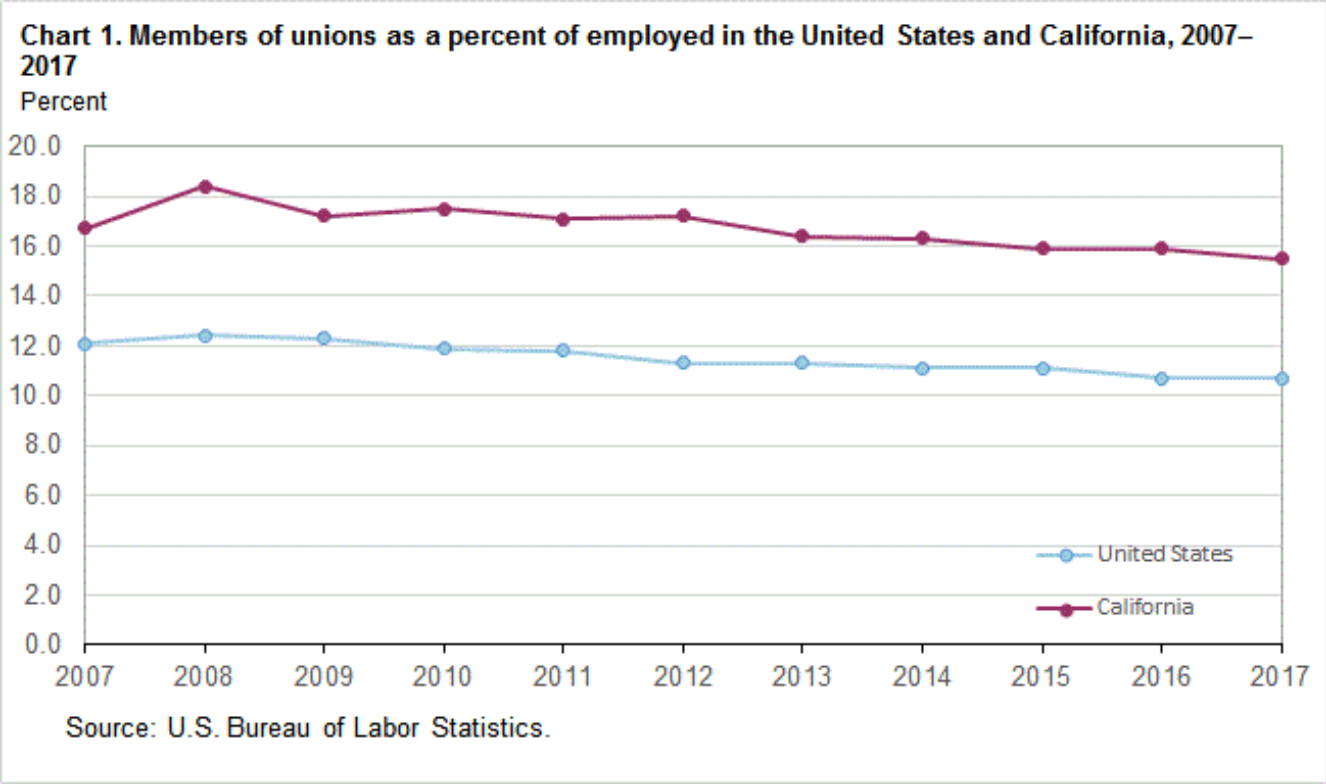


Representation Cases (R-Cases)

- Different types of elections: for certification, decertification, deauthorization, clarification
- The NLRA permits secret ballot elections of unions to become representatives of employees for collective bargaining and to decertify and remove unions as representatives.
- Union elections are based upon petitions filed with the NLRB by unions, if the union receives cards or other showing of interest
  - Minimum 30% "showing of interest" required. New policy allows electronic signatures for showing of interest.
- A union must receive a majority of the valid votes cast to win the election. In a tie vote, the union loses.

Overview of R-Case Procedure

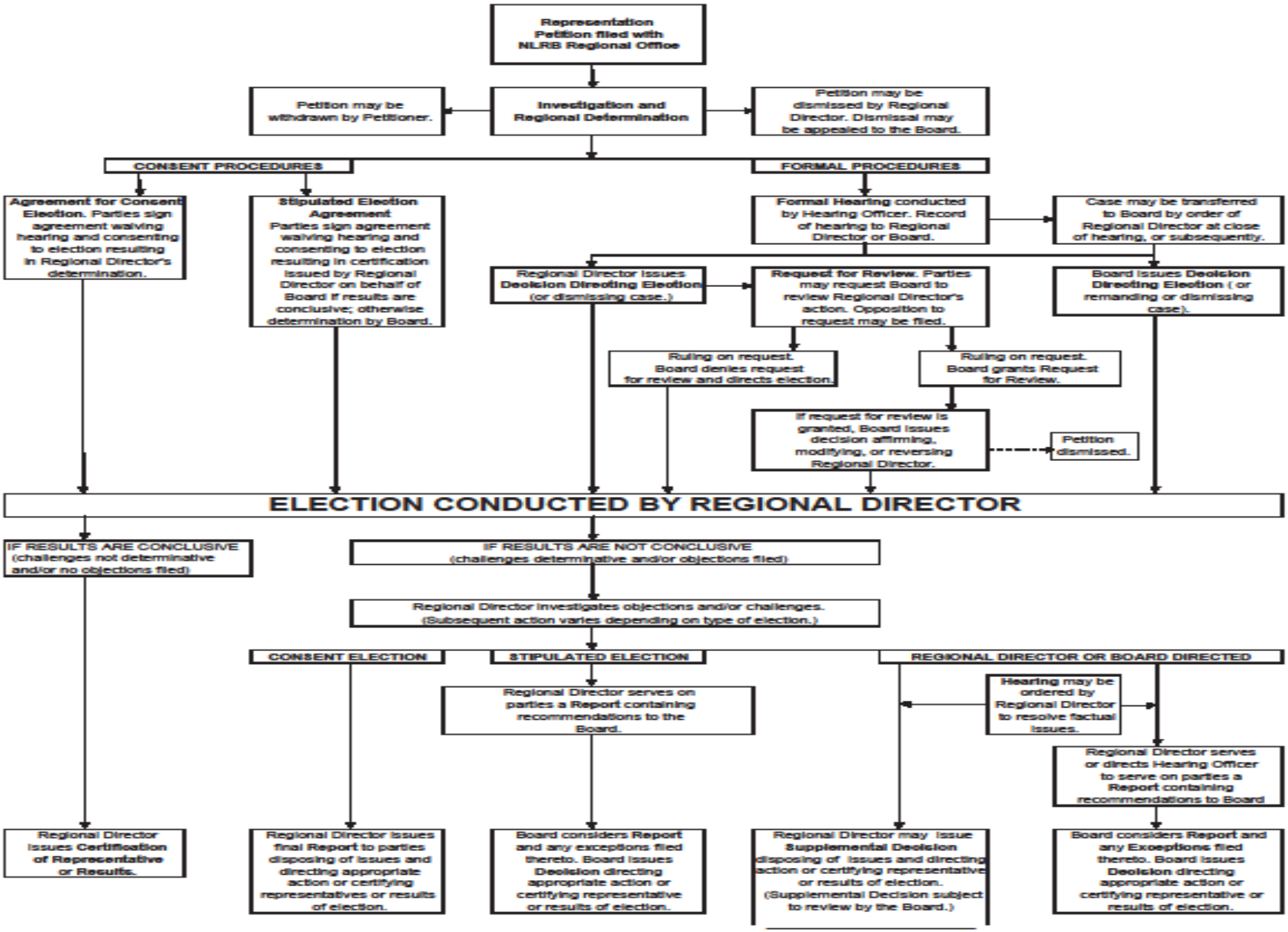
- PETITION is filed by a union, employee or an employer
- If showing of interest is insufficient or tainted, or if there is a applicable bar, the Petition is dismissed.
- PETITION may be blocked by a filing of a ULP Charge
- Board Agent will try to obtain a Stipulated Election Agreement or Consent Agreement
- If no Stip, then the RD issues a Notice of Hearing, and after the hearing will issue a Decision, which can be appealed to the Board through a Request for Review.
- If Petition not dismissed and RD's Decision upheld or pursuant to Stip, Election is conducted.
- Results of the Election Certified or Losing Party may file Objections to the Election, which is generally resolved by a hearing, which then can be reviewed by the Board.

Basic Obligations

- Cannot interfere or coerce employees into supporting or not supporting the union or employer.
- Appear at the Hearing and Comply with Subpoenas.
- Employer will need to furnish a list of employees and their contact information.
- Employer will need to post the Notice of Election for sufficient number of days.
- Refrain from electioneering near or around the polling area or engage in any other conduct that may affect the results of the election (*i.e.*, objectionable conduct).

NATIONAL LABOR RELATIONS BOARD

BASIC REPRESENTATION PROCEDURES UNDER SECTION 9(c)



Unfair Labor Practice Charges Practice and Procedures Overview

- Unfair labor practice allegations are commenced only through a filing of a CHARGE at one of the NLRB Regional Offices nationally.
- Every office has an INFORMATION OFFICER OF THE DAY whose entire purpose is to help you file a charge correctly.
- A CHARGE must be filed within 6 months of the alleged violation of the Act.
- Once filed, the Regional Office will serve the Charge but if you are very close to the 6 month statute of limitations you should serve the charge yourself.
- Charge Against Employer and Charge Against Labor Organization forms are available on www.nlrb.gov.

Unfair Labor Practice Cases

- Once filed, the Regional Office assigns the charge to a Board Agent, who will interview witnesses to support the charge which culminates into a sworn affidavit. If you do not provide your affidavit and supporting evidence by the deadline provided, your charge will be dismissed for "lack of cooperation."
- The Region generally, but not always, solicits affidavits (sworn statements) from the Charged Party to provide a position statement or evidence in response.
- After investigation, the investigator meets with the Regional Director, and/or her designee, and decides whether to dismiss the charge or issue Complaint. However, before this stage, charges may be deferred to a grievance or grievance procedure or sent to the Division of Advice or the Contempt Branch.

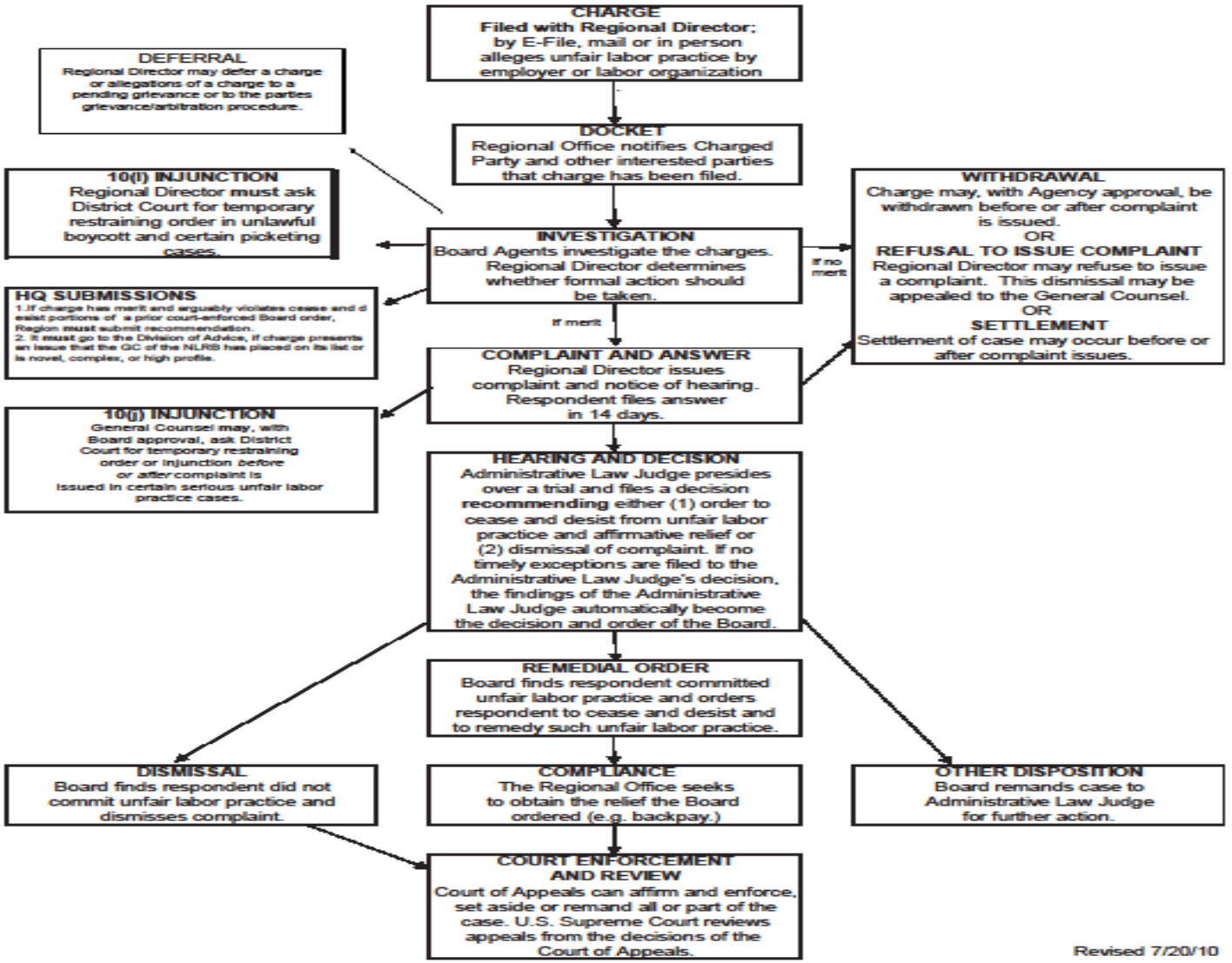
Unfair Labor Practice Cases

- Decisions to dismiss the charge may be appealed to the General Counsel's Office of Appeals.
- If the Region issues a Complaint then the matter proceeds to hearing before an Administrative Law Judge. The Charging Party will have the opportunity to intervene, although many do not, leaving the case to the General Counsel to litigate.
- Once the ALJ issues a decision any aggrieved party may take exceptions from the decision, which is an appeal to the Board. The NLRB's decision is not self-enforcing, but requires the Board to file a petition for enforcement in the appropriate Circuit. Any aggrieved party may file a petition for review.

Unfair Labor Practice Cases

- Typical allegations against unions or employers are:
  - unlawful statements (threats, interrogations, promises, or implied surveillance) which may or does impact employees' union activity;
  - discrimination against employees in retaliation for union-related activity; and
  - refusals to bargain in good faith over wages, hours, or terms and conditions of employment when an employer and a union have a valid collective bargaining relationship (*i.e.*, after a valid NLRB election and certification).
- These types of allegations take many different forms. The legal standards the NLRB follows and enforces on these issues largely flows from the caselaw the NLRB and the federal courts have established since the Act was passed in the 1930s.

NATIONAL LABOR RELATIONS BOARD
BASIC PROCEDURES IN CASES INVOLVING CHARGES OF UNFAIR LABOR PRACTICES



Revised 7/20/10

For More Information

- Go to www.nlrb.gov:
  - Sign up to e-file (now mandatory for most documents);
  - Sign up for regular updates;
  - Conduct research;
  - Obtain statistics;
  - Find a regional office near you; and
  - Request a speaker.

The NLRB public website may experience intermittent outages during scheduled maintenance activities on Friday, January 10th, 2020 from 10:00 PM until Saturday, January 11th, 2020 2:00 AM EST.

We apologize for any inconvenience this may cause.

Christy J. Kwon Named Regional Attorney for Region 32

Office of Public Affairs
202-273-1991
publicinfo@nlrb.gov
www.nlrb.gov

November 1, 2017

On October 31, 2017, National Labor Relations Board General Counsel Richard F. Griffin, Jr. announced the appointment of Christy J. Kwon as the Regional Attorney of the NLRB's Regional office in Oakland, California (Region 32). In her new position, Ms. Kwon will assist Regional Director Valerie T. Hardy-Mahoney in the administration and enforcement of the National Labor Relations Act in portions of northern California and the northern half of Nevada. She succeeds Ms. Hardy-Mahoney, who previously served as Regional Attorney.

Ms. Kwon received her B.A. degree from the University of California, Berkeley, with highest honors in Sociology and Ethnic Studies, and her J.D. degree from UCLA School of Law. She began her NLRB career as a Field Attorney at the West Los Angeles office in 2001. She transferred to the San Francisco office in 2005, where she served as a Field Attorney until her promotion to Supervisory Attorney in 2012.

The NLRB is an independent federal agency enforcing the National Labor Relations Act, which guarantees the right of most private sector employees to organize, to engage in group efforts to improve their wages and working conditions, to determine whether to have unions as their bargaining representative, to engage in collective bargaining, and to refrain from any of these activities. It acts to prevent and remedy unfair labor practices committed by private sector employers and unions.

CNN TO PAY $76 MILLION IN BACKPAY
January 10, 2020

Board Restores Longstanding Arbitral Deferral Standards
December 23, 2019

Board Restores Employers' Right to Restrict Use of Email
December 17, 2019

Board Approves Greater Confidentiality in Workplace Investigations
December 17, 2019

Board Restores Longstanding Union Dues Checkoff Rule
December 16, 2019

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MORRISON
FOERSTER

Kwan Park

ASSOCIATE

425 MARKET STREET
SAN FRANCISCO, CA
94105-2482
(415) 268-6282
BPARK@MOFO.COM

EDUCATION

CORNELL UNIVERSITY
(B.S., 2012)
STANFORD LAW SCHOOL
(J.D., 2015)

BAR ADMISSIONS

CALIFORNIA
NEW YORK

PRACTICES

EMPLOYMENT + LABOR LITIGATION

Kwan Park's practice focuses on employment and labor litigation and counseling.

Kwan has represented clients in both defensive and affirmative trade secret misappropriation and employee mobility matters. He has, for example, successfully opposed a preliminary injunction motion in a lawsuit involving claims related to the alleged breach of a non-compete by the plaintiff's former senior executive in China. Kwan has defended clients against claims of employee and customer raiding and unfair competition and has also investigated and prosecuted claims in matters involving the misappropriation of proprietary and confidential information by former employees.

In addition to trade secret misappropriation and employee mobility matters, Kwan has defended employers against a wide-range of employment-related claims such as discrimination, whistleblower retaliation, and independent contractor misclassification, including successfully defending through a successful summary judgment motion a pattern and practice age and national origin discrimination case for a transnational technology company. Kwan has represented employers at the bargaining table during negotiations with unions and in labor arbitration and has defended clients against unfair labor practice charges before the National Labor Relations Board. Kwan also has experience litigating complex wage and hour actions across the nation and has represented clients before the California Division of Labor Standards Enforcement and the California Employment Development Department.

During law school, Kwan served as a judicial extern to the Honorable Edward J. Davila in the Northern District of California. He has also worked as a Ford Foundation Fellow for the National Health Law Program and as an intern at the U.S. Department of Justice's Civil Rights Division, the U.S. Equal Employment Opportunity Commission, and the National Labor Relations Board.

Kwan is a graduate of Stanford Law School, where he was an articles editor of the *Stanford Law Review*. He received his B.S. in Industrial and Labor Relations from Cornell University's ILR School.

Kwan is fluent in Korean and is admitted to practice in California and New York.